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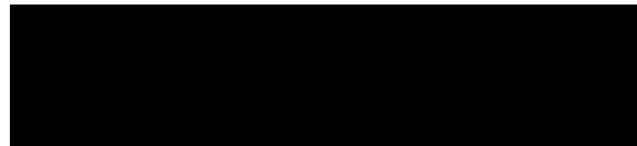
FILE: LIN 06 270 52375 Office: NEBRASKA SERVICE CENTER Date: NOV 29 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mark Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a salon and day spa. It seeks to employ the beneficiary permanently in the United States as a financial manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. Specifically, counsel asserts that the director failed to consider all of the evidence submitted, including bank statements. All of the evidence will be considered in detail below. For the reasons discussed below, however, we uphold the director's conclusion that the petitioner has not established its ability to pay the proffered wage as of the priority date in this matter.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 17, 2006. The proffered wage as stated on the Form ETA 750 is \$57,824 annually. On part J of the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1996, a gross annual income of \$1,050,584, a net loss of \$25 and 25 employees. In support of the petition, the petitioner submitted its 2004 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return and the petitioner's bank statements for March 2006 through July 2006.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 18, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R.

§ 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its 2005 IRS Form 1120 tax return and its bank statement for August 2006. The petitioner also submitted its employer quarterly return for the third quarter of 2006. Finally, the petitioner submitted its deposit account history for October 2006.

In 2004, the petitioner claimed a net income “before net operating loss deduction and special deductions” of \$462 and listed current liabilities that exceeded its current assets. In 2005, the petitioner suffered a net loss “before net operating loss deduction and special deductions” of \$2,030 and listed current liabilities that exceeded its current assets. The petitioner’s bank statements reflect a beginning balance on March 1, 2006 of [REDACTED] and ending monthly balances for March 2006 through August 2006 ranging from [REDACTED] and ending with a balance of \$10,315.27.

The director determined that the tax returns submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 14, 2006, denied the petition.

On appeal, counsel asserts that the director erred in relying solely on the petitioner’s tax returns. Counsel asserts that the director’s failure to consider the bank statements is contrary to “binding decisions of the AAO and [the Board of Alien Labor Certification Appeals (BALCA)], two appellate administrative bodies that have rendered precedent decisions on the issue of the petitioner’s ‘ability to pay.’” The only AAO decision referenced by counsel is a 2002 decision that does not appear to be a designated precedent pursuant to 8 C.F.R. § 103.3(c). While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel provides no legal authority, and we know of none, for the assertion that BALCA decisions are binding on CIS officers. Moreover, counsel does not cite a BALCA decision but a “Deskbook.” The regulation at 8 C.F.R. § 204.5(g)(2) clearly provides the authority for CIS to make an independent evaluation of an employer’s ability to pay the proffered wage. This authority has never been contested in the federal courts cases that have addressed this issue, cited in detail below. That said, we concur with counsel that the regulation at 8 C.F.R. § 204.5(g)(2) does permit the submission of bank account records “in appropriate cases.”

On appeal, the petitioner submits bank statements for September through December 2006 reflecting ending monthly balances of \$9,707.05, \$8,767.01, \$15,791.60 and \$17,406.25. The petitioner also submitted evidence that the petitioner paid the beneficiary a weekly salary of \$1,112 from September 25, 2006 through October 15, 2006, which annualizes to the proffered wage. Counsel acknowledges that the petitioner began working for a different employer after October 15, 2006. The evidence of wages paid to the beneficiary for late September and early October 2006, however, was available on November 21, 2006, when the petitioner responded to the director’s request for additional evidence. We note that the director requested Forms W-2 and personnel records, putting

the petitioner on notice that evidence of wages paid to the beneficiary were relevant. Nevertheless, the petitioner appears to have made a good faith effort to respond to the director's requests.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006. Moreover, the petitioner did not begin paying the full proffered wage on the priority date, July 17, 2006. Rather, the petitioner paid the beneficiary \$3,336 between September 25, 2006 and October 15, 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner need only establish its ability to pay the proffered wage as of the priority date in 2006. The petitioner's 2006 tax returns, however, were not available when the petition was filed, or possibly even as of date the appeal was filed, January 16, 2007. In such circumstances, we must look at the tax return for the previous year. As stated by the director, the petitioner suffered a net loss in 2005 and its current liabilities exceeded its current assets. Thus, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net income or net current assets.

Reliance on the balances in the petitioner's bank account is not more reliable than tax returns as claimed by counsel on appeal. While it may be true that bank statements are a more reliable indication of available cash at a specific time than the "net income" figure on a tax return, cash is a current asset that is already taken into account by CIS when considering the information on Schedule L. In this matter, however, the petitioner's 2006 tax return and, thus, Schedule L, was not available. Nevertheless, current assets must be balanced against current liabilities to provide an accurate picture of the petitioner's finances. The record contains no evidence that the petitioner's current liabilities were significantly reduced in 2006 compared to previous years. Moreover, the fact that each bank statement may reflect an ending balance above the proffered monthly wage is not persuasive in matters where the petitioner is relying on bank statements to demonstrate an ability to pay the proffered wage over several months. Any funds expended to pay the monthly proffered wage in one month would not be available the next month or carried over onto the next month's statement. Thus, the petitioner's bank statements must demonstrate a continuing (and thus accumulating) ability to pay the monthly proffered wage in each successive month for which bank statements are the sole documentation.

In this matter, the petitioner relies on bank statements to demonstrate an ability to pay the proffered wage over five and one half months. The following breakdown demonstrates the funds that would need to be available to pay the proffered wage during the 21 weeks in 2006 after the priority date when the beneficiary was not paid. The petitioner would need to demonstrate that it had sufficient cash to cover two weeks of the weekly proffered wage at the end of July 2006 (\$2,224), plus an additional five weeks of the weekly proffered wage at the end of August 2006 [REDACTED] plus an additional three weeks of the weekly proffered wage at the end of September 2006² [REDACTED]

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² The petitioner need not demonstrate the ability to pay the proffered wage during the week in September 2006 that it actually paid that wage.

or \$11,120), plus an additional two weeks of the weekly proffered wage at the end of October 2006³ (\$11,120 plus \$2,224 or \$13,344), plus an additional five weeks of the weekly proffered wage at the end of November 2006 (\$13,344 plus \$5,560 or \$18,904) and an additional four weeks of the weekly proffered wage at the end of December 2006 [REDACTED] Thus, the total amount of the proffered wage prorated to the relevant [REDACTED]

The petitioner's bank balances in July and August were sufficient to cover the proffered wage during that period but the bank balances were insufficient after that period. Specifically, the amounts needed to pay the proffered wage in months of September through December of 2006 *cumulatively* as compared with the petitioner's actual balances are as follows:

Month	Amount Needed	Actual Balance
January	\$1,000	\$1,000
February	\$1,000	\$1,000
March	\$1,000	\$1,000
April	\$1,000	\$1,000
May	\$1,000	\$1,000
June	\$1,000	\$1,000
July	\$1,000	\$1,000
August	\$1,000	\$1,000
September	\$1,000	\$1,000
October	\$1,000	\$1,000
November	\$1,000	\$1,000
December	\$1,000	\$1,000

Thus, the petitioner has not demonstrated that its bank account held sufficient funds to *continuously* cover the monthly proffered wage after August 2006. Moreover, we note that this analysis does not even take into account other current liabilities the petitioner may have had outstanding during this time.

Finally, we acknowledge that the petitioner has submitted evidence of a bank line of credit. The petitioner's line of credit will not be considered. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. If the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. In general, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See generally Matter of Great Wall*, 16 I&N Dec. 142, 143-45 (Act. Regl. Commr. 1977).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

³ The petitioner need not demonstrate the ability to pay the proffered wage during two weeks in October 2006 that it actually paid that wage.

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ORDER: The appeal is dismissed.